No. 87-1201

In The

Supreme Court of the United States

October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,

Petitioners,

v.

ERNST & WHINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 15, 1988
CERTIORARI GRANTED JUNE 6, 1988

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Relevant Excerpts from Docket Sheet of
Myles Osterneck, et al. v. E.T. Barwick Industries, Inc. et al.
Docket No. C75-1728A
Northern District of Georgia
Atlanta Division

Date	Proceedings
Sept. 10, 1975	Complaint filed.
Jan. 30, 1985	JURY TRIAL: VERDICT reached in favor of pla in amt of $2,632,234.00 as compensatory damages against dft E.T. Barwick Ind., M.E. Keller & B.A. Talley; Pla's moved for pre-judgment int; ct directed plas to submit brief w/in 10 days thereafter; Ct will not submit issue of 2 yr. statute of limitations to jury & directed clerk to enter judgment. EXHIBITS returned to pla & dft's counsel.
	VERDICT for pla.
	JUDGMENT ENTERED in favor of plas. & against dfts. E.T. Barwick Industries, Inc., M.E. Kellar & B.A. Talley on the Federal Securities Claim & State Common Law Claim in the amount of $2,632,234.00 as compensatory damages w/int. at rate of 9.09% & costs; further that dft E.T. Barwick recover of plas his costs of action; & in favor of dft, Ernst & Whinney & against plas on FSC & that dft E&W recover of plas costs of action, cc & eod 1/31/85.
Feb. 11, 1985	MOTION for award of prejudgment interest w/brief, aff of Walter Singer by plas.
Feb. 20, 1985	(File closed statistically).
Feb. 26, 1985	SUBMITTED ON MOTION FOR AWARD OF PREJUDGMENT INTEREST BY PLAS.

Date	Proceedings
Mar. 1, 1985	NOTICE OF APPEAL by plas, from the verdict/judgment dated January 30, 1985, fees paid cc & cert c/dkt., NOA, verdict/ judgment to USCA ACK.
	NOTICE OF APPEAL by Buford Talley, dft, from verdict/judgment dated January 31, 1985, fees paid, cc & cert c/dkt, NOA, verdict/judgment to USCA. ACK
Mar. 14, 1985	NOTICE OF APPEAL by E.T. Barwick, Inc. dft, from the judgment & jury verdict, PD dated 1/30/85, *no fees paid*, cc & cert c/dkt, NOA, judgment to USCA. ACK-85-8165
Mar. 15, 1985	NOTICE OF CROSS-APPEAL by dft, Ernst & Whinney from ct's order & rulings which held that a four-year limitations period was applicable to plas' claims under § 10(b) of Securities Exchange Act of 1934 & Rule 10b-5 promulgated thereunder, *no fees paid*, cc & cert c/dkt, NOA, judgment to USCA (paid 3/25/85) ask-85-8165
Mar. 22, 1985	RESUBMITTED ON MOTION FOR AWARD OF PREJUDGMENT INTEREST BY PLAS.
Mar. 28, 1985	ORDER DENYING dft's motion to stay execution of judgment w/out giving bond, cc & eod 3/29/85.
June 21, 1985	NOTICE OF APPEAL by Ernst & Whinney, from the order dated 5/22/85, regarding E & W's bill of costs, cc & cert c/dkt, order & NOA to USCA, no fees paid, ltr to E & W's atty on 7/2/85. ACK-85-8523 (PAID 7/5/85)

Date	Proceedings
July 1, 1985	ORDER GRANTING plas' motion for award of prejudgment interest; plas shall recover of dfts E.T. Barwick Industries, Inc., M.E. Kellar, and B.A. Talley an award of prejudgment interest in the amt of $945,512.85 on the federal securities claim, cc & eod 7/9/85.
July 9, 1985	AMENDED JUDGMENT ENTERED by adding "plaintiff shall recover of dfts, E.T. Barwick Ind., Inc., M.E. Kellar, & B.A. Talley an award of prejudgment interest in the amount of $945,512.85 on the federal securities claim," cc & eod 7/9/85.
July 31, 1985	NOTICE OF CROSS APPEAL by plas against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc., and E.T. Barwick from that portion of the ct's orders & amended judgment which provide the prejudgment interests & costs awarded to pltfs (fee paid) cert. copy of dkt., NO Cross-APPEAL, Order & amended judgment to USCA, cc & eod 8/2/85 ACK 85-8593.

[R82-8496]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, ET AL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	
E. T. BARWICK INDUSTRIES, ET AL,	)	NO. C75-1728A
	)	
	)	
Defendants.	)	

- VOLUME 54 -

Transcript of proceedings before The Honorable Horace T. Ward, United States District Judge, and a jury, at Atlanta, Fulton County, Georgia, commencing on October 16, 1984.

• • •

(Discussion in Open Court on January 30, 1985)

The Court: There's another matter that has to be brought to the court on this issue, that is, prejudgment interest on this particular verdict, but I am going to have to handle that separately and have it argued to me.

All right, we'll stand in recess, and just on that one point as to whether a mini-trial or resubmission of the matter to the jury on whether they would find that the issue was barred by a two-year statute of limitations. It will be one question if it's submitted.

You discuss it among yourselves and come back to my office and I will decide when I'm going to hear the prejudgment interest arguments.

We'll stand in recess for ten minutes.

[A short recess was had.]

The Court: All right. I will hear the motion concerning prejudgment interest. I know it's going to be offered from the plaintiffs. Just state on the record that you are going to move for prejudgment interest.

Mr. Webb: Yes, Your Honor, we are. We do move for prejudgment interest in favor of the plaintiffs against the defendants against whom the verdicts were returned.

The Court: In view of the fact that I do not wish to have it argued right now and based on the request of the lawyers, I will allow it to be submitted in writing.

The plaintiffs will have ten days to present to the judge the plaintiffs' position on prejudgment interest and the affected defendants will have ten days thereafter, after they receive a copy of the brief and submission of the plaintiffs, to respond and then the judge will rule on it.

The judge will direct the clerk to issue a judgment on the verdict and I don't think—I think it can be done without having to have the lawyers submit proposed judgments. Sometimes you have to do that, but I think it can be figured out, Ms. Daniels. If you need any assistance you can talk to the judge.

The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is granted it will be—the judgment can be amended.

• • •

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,

Plaintiffs

CIVIL ACTION

VS

NO. C75-1728A

E. T. BARWICK INDUSTRIES, INC., E. T. BARWICK, M. E. KELLAR, B. A. TALLEY AND ERNST & WHINNEY

Defendants

JUDGMENT

This action came before the Court and a jury, Honorable Horace T. Ward, U. S. District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiffs and against the defendants E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR and B. A. TALLEY on the Federal Securities Claim and the State Common Law Claim in the amount of TWO MILLION, SIX HUNDRED THIRTY-TWO THOUSAND, TWO HUNDRED THIRTY-FOUR & 00/100 dollars. ($2,632,234.00) as compensatory damages, with in-

terest thereon at the rate of 9.09% as provided by law, and their costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of defendant E. T. BARWICK and against the plaintiffs on the Federal Securities Claim and the State Common Law Claim and that the defendant E. T. BARWICK recover of the plaintiffs his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered in favor of the defendant ERNST & WHINNEY and against the plaintiffs on the Federal Securities Claim and that defendant ERNST & WHINNEY recover of the plaintiffs its costs of action.

Dated at Atlanta, Georgia, this 30th day of January, 1985.

FILED & ENTERED IN CLERK'S OFFICE
THIS 30TH DAY OF JANUARY, 1985
BEN H. CARTER, CLERK

By: Patsy L. Daniels
Deputy Clerk

BEN H. CARTER, CLERK
/s/ Patsy L. Daniels
Patsy L. Daniels
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	FILE NO.
E. T. BARWICK	)	C75-1728A
INDUSTRIES, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR AWARD
OF PREJUDGMENT INTEREST

COME NOW Plaintiffs, Myles Osterneck, Guy-Kenneth Osterneck and Robert Osterneck and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (hereinafter "Plaintiffs") and move the Court for an award of prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985, against Defendants E. T. Barwick Industries, Inc., Melvin E. Kellar and Buford A. Talley, and respectfully show the Court the following:

1.

On January 30, 1985, a Verdict and Judgment in favor of Plaintiffs was filed and entered in the above-styled action and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley on their Federal Securities Claims and State of Georgia common law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages.

2.

Pursuant to the instructions of the Court given to the jury, the amount of the compensatory damages awarded to Plaintiffs was based on their damages as of the date of the Merger Agreement which is September 8, 1969.

3.

The grounds and authority for the award of prejudgment interest to Plaintiffs and the appropriate amount of interest are provided in Plaintiffs' accompanying Brief in support of its Motion for an award of prejudgment interest concurrently filed herewith.

4.

Plaintiffs also submit in support of their Motion for an award of prejudgment interest an Affidavit of Walter M. Singer with exhibits which is currently filed herewith.

WHEREFORE, for the reasons contained in Plaintiffs' Brief and the Affidavit of Walter M. Singer, Plaintiffs respectfully request that this Court award it prejudgment interest from September 8, 1969 to the date of the Judgment.

Respectfully submitted,

/s/

PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/

HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

Of Counsel:

WEBB & DANIEL
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229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-8841

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

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35 Broad Street
Atlanta, Georgia 30335

This 11 day of February, 1985.

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., *Plaintiffs,* v. E. T. BARWICK INDUSTRIES, INC., et al., *Defendants.*	CIVIL ACTION FILE NO. C75-1728A

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR AWARD OF PREJUDGMENT INTEREST

INTRODUCTION

Plaintiffs filed their Complaint in the above-referenced action on September 4, 1975. The trial of this case began on October 15, 1984 and ended with a verdict and judgment on January 30, 1985.

The verdict and judgment rendered by the jury was in favor of the Plaintiffs and against Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley (hereinafter "Defendants") on the Federal Securities claims and the Georgia common law and statutory fraud claims in the amount of Two Million, Six Hundred Thirty-Two Thousand, Two Hundred Thirty-Four Dollars ($2,632,234.00) as compensatory damages. This verdict and judgment was filed and entered in the Clerk's office on January 30, 1985.

Pursuant to the Court's instructions given to the jury, the amount of compensatory damages was determined as of the date of the Merger Agreement entered into between Plaintiffs and Defendant E. T. Barwick Industries, Inc. That date is September 8, 1969. Thus, pursuant to the Court's instructions, the amount of $2,632,234 as compensatory damages is the amount of damages the Plaintiffs suffered on September 8, 1969.

Plaintiffs have filed concurrently herewith their Motion for an award of prejudgment interest at the request of the Court. Plaintiffs submit this Brief in support of their Motion. Plaintiffs also submit in support of their Motion an Affidavit of Walter M. Singer concurrently filed herewith, containing the calculations of an appropriate award of prejudgment interest.

ARGUMENT AND CITATIONS OF AUTHORITIES

1. PLAINTIFFS ARE ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST FROM SEPTEMBER 8, 1969 TO THE DATE OF JUDGMENT

It is well-established that in the absence of a statutory provision, the award of prejudgment interest lies within the discretion of the Court, including cases involving Federal Securities law and state common law fraud claims. *E.g. Blau v. Lehman,* 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403, 411 (1962); *Huddleston v. Herman & MacLean,* 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds,* — U.S. —, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (Federal Securities claim, § 10(b) and Rule 10b-5 case); *Hembree v. Georgia Power Company,* 637 F.2d 423, 430 (5th Cir. 1981); *Payne v. Panama Canal Company,* 607 F.2d 155, 166 (5th Cir. 1979);

West v. Harris, 573 F.2d 873, 883 (5th Cir. 1978); *cert. denied,* 440 U.S. 946, 99 S.Ct. 1424, 59 L.Ed.2d 635 (1979); *Wolf v. Frank,* 477 F.2d 467 (5th Cir.), *cert. denied,* 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) (federal securities claim under Rule 10b-5); *George R. Hall, Inc. v. Superior Trucking Company, Inc.,* 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

This well-established rule is universally applied by other jurisdictions. *E.g., Sharp v. Coopers & Lybrand,* 649 F.2d 175, 192-193 (3d Cir. 1981) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 case); *Rolf v. Blyth Eastman Dillon & Co., Inc.,* 570 F.2d 38, 50 (2d Cir. 1978) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 case); *Holmes v. Bateson,* 583 F.2d 542, 564 (1st Cir. 1978) (appropriate to award prejudgment interest in § 10b and Rule 10b-5 case); *Sundstrand Corp. v. Sun Chemical Corp.,* 553 F.2d 1033, 1051 (7th Cir. 1977) (appropriate to award prejudgment interest in § 10(b) and Rule 10b-5 merger case from the date of merger agreement to the date of judgment); *Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc.,* 496 F.2d 1255, 1268-1269 (4th Cir.), *cert. denied,* 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (1974) (appropriate to award prejudgment interest especially in § 10(b) and Rule 10b-5 case); *Wessel v. Buhler,* 437 F.2d 279, 284 (9th Cir. 1971); *Norte & Company v. Huffines,* 416 F.2d 1189, 1191, 1192 (2d Cir. 1969), *cert. denied sub nom,* 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970); *Freshi v. Grand Coal Venture,* 588 F.2d 1257, 1260 (S.D.N.Y. 1984) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Western Federal Corporation v. Davis,* 553 F.Supp. 818 (D. Ariz. 1982)

aff'd, 739 F.2d 1439 (9th Cir. 1984) (appropriate to award prejudgment interest at the on-going commercial money market rate in a Federal Securities fraud case involving § 10(b) and Rule 10b-5; *Spatz v. Borenstein,* 513 F.Supp. 571, 584 (N.D. Ill. 1981) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Blasdel v. Mullenix,* 356 F.Supp. 924, 928 (W.D. Okla. 1971) (appropriate to award prejudgment interest in a Federal Securities fraud case involving § 10(b) and Rule 10b-5); *Johns Hopkins University v. Hutton,* 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970) (appropriate to award prejudgment interest in Federal Securities fraud case involving § 10(b) and Rule 10b-5).

II. THE FACTORS TO BE APPLIED IN DETERMINING AN APPROPRIATE AWARD OF PREJUDGMENT INTEREST

In determining whether to award prejudgment interest, the major factor permeating cases in which prejudgment interest has been allowed is the necessity to compensate an injured plaintiff, and the courts recognize that "the only way the wronged party can be made whole is to award him [prejudgment] interest from the time he should have received the money." *E.g., Hembree v. Georgia Power Company,* 637 F.2d 423, 430 (5th Cir. 1981), *quoting Louisiana & Arkansas Railway v. Export Drum Co.,* 359 F.2d 311, 317 (5th Cir. 1966); *Payne v. Panama Canal Company,* 607 F.2d 155, 166 (5th Cir. 1979); *West v. Harris,* 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied,*

440 U.S. 946 (1979); *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 997-998 (N.D. Ga. 1982).

The general rule in this Circuit, that the only way the wronged party can be made whole is to award him prejudgment interest from the time he should have received the money on the date of the purchase or sale, is based on the principal that at the conclusion of the litigation the parties should be in the same position they occupied at the time of the transaction which lead to the litigation. *E.g., Hembree, supra*, 637 F.2d at 450; *Payne, supra*, 607 F.2d at 166; *West, supra*, 573 F.2d at 882-883; *Louisiana & Arkansas Railway Co., supra*, 359 F.2d at 317; *George R. Hall Company, Inc., supra*, 532 F.Supp. at 997-998.

The federal standard applied in determining an award of prejudgment interest in § 10(b) and Rule 10b-5 cases "is one of fairness" and a balancing of the equities. *Huddleston, supra*, 640 F.2d at 560 and cases cited in fn. 48 of the opinion; *Balan v. Lehman*, 368 U.S. 403, 82 S.Ct. 451, 457; *Sharp v. Coopers & Lybrand, supra*, 649 F.2d at 193; *West, supra*, 573 F.2d at 883; *Norte & Co.*, 416 F.2d at 1191; *Wessel, supra*, 437 F.2d at 284; *Wilsmann v. The Upjohn Co.*, 572 F.Supp. 242, 245 (W.D. Mich. 1983) (allowed an award of prejudgment interest in Federal Securities fraud case involving § 10(b) and Rule 10b-5 case).

In considering the fairness to the plaintiff for an award of prejudgment interest, the courts focus on awarding the plaintiff an amount to compensate him *for the value of the lost use of his money*. *E.g., see* cases previously cited for the proposition that the only way to make the plaintiff whole is to award him prejudgment interest from the time he should have received the

money cited above; ***Kris-Kraft Industries, Inc. v. Piper Aircraft Corp.***, 516 F.2d 172, 191 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1, 97 S.Ct. 926 (1977) (an award of prejudgment interest should compensate the plaintiff for the lost use of his money); *Freschi v. Grand Coal Venture, supra*, 588 F.Supp. at 1261 (award of prejudgment interest should compensate a plaintiff for the lost use of his money); *Western Federal Corp. v. Davis, supra*, 553 F.Supp. at 821 *aff'd* (award of prejudgment interest at the commercial money market rate in an effort to compensate the plaintiffs for the loss of the use of their money); *George R. Hall, Inc., supra*, 532 F.Supp. at 997 (the court held it was impossible to say that a plaintiff had been made whole if it was merely paid back the costs of its 1979 repairs in inflated 1982 dollars without any prejudgment interest); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1228 (D.C. Md. 1968), *aff'd in part & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974) (rate of prejudgment interest awarded should "compensate fairly the defrauded purchaser for the loss of the use of his money", 297 F.Supp. at 1229); *see Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966).

Other factors and standards which federal courts use in determining whether or not to grant prejudgment interest in a § 10(b) and Rule 10b-5 case include the degree of personal wrongdoing on the part of the Defendants, whether the prejudgment interest would be compensatory in nature, whether Plaintiffs passed up other, reasonably available and attractive opportunities, whether the Plaintiffs intentionally prolonged

the time between the occurrence of the violation and the award of the Judgment or whether the Defendants were at least equally if not more responsible for the delay. *E.g., Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-1192 (2d Cir. 1969); *Wilsmann v. The Upjohn Company*, 572 F.Supp. 242, 245 (W.D.Mich. 1983); *Western Federal Corporation v. Davis*, 553 F.Supp. 818, 821 (D.Ariz. 1982), *aff'd*, 739 F.2d 1439 (9th Cir. 1984); *Johns Hopkins University v. Hutton*, 297 F.Supp. 1165, 1227-1230, 1233 (D. Md. 1968), *aff'd & rev'd in part on other grounds*, 422 F.2d 1124 (4th Cir. 1970); *see* cases cited *supra* holding that considerations of fairness must be reviewed and that the only way to make a plaintiff whole is to award him prejudgment interest for the lost use of his money; *see Huddleston v. Hermon & MacLean*, 640 F.2d 534, 560 and cases cited in fn. 48 (5th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, — U.S. —, 103 S.Ct. 683, 74 L. Ed.2d 548 (1983).

Turning to the facts in this case, an award of prejudgment interest clearly is fair under any analysis or considerations of fairness. The jury has found that the Defendants E. T. Barwick Industries, Inc., M. E. Kellar and B. A. Talley violated Federal Securities laws and statutory and common law fraud against the Plaintiffs and, as a result of their actions and conduct, Plaintiffs sold their family business which was their primary if not their sole asset, on terms which they would not have accepted but for such conduct and actions on the part of these Defendants.

It is clear that if the Plaintiffs had been informed of what the jury has found to be the truth concerning the

inaccuracy of the financial statements and financial condition of E. T. Barwick Industries, Inc., they would not have entered into the Merger Agreement. The jury awarded damages pursuant to the Court's instructions as of the date of the merger, September 8, 1969. The Plaintiffs have lost the use of that money since September 1969. Thus, the degree of personal wrongdoing on the part of these Defendants has been established, and fundamental considerations of fairness dictate an award of prejudgment interest be provided to the Plaintiffs.

The uncontradicted testimony at trial established that there was available substantial and reasonable alternative investment opportunities to the Plaintiffs prior to their entering the merger with E. T. Barwick Industries, Inc. [Trial Testimony of: Eric Blum, Kenneth Chasser, Myles Osterneck, and Guy Osterneck]. Therefore, there can be no doubt that the Plaintiffs passed up other, reasonably available and attractive opportunities to enter into this Merger Agreement and purchase stock of E. T. Barwick Industries, Inc. in exchange for the stock and assets of their family business, Cavalier Bag Company.

The Merger Agreement occurred on September 8, 1969. This case, instituted on September 4, 1975, did not come to trial for over nine (9) years. The trial in this case began on October 15, 1984. The delays involved in this complicated case, complicated both in terms of fact and law, cannot be laid on the doorstep of the Plaintiffs. In fact, the record in this case clearly demonstrates that the fault for the delay in bringing this case to trial lies squarely on the Defendants. Even a cursory review of the voluminous docket sheet filed in this case demon-

strates this fact. The Defendants filed numerous motions including several motions for reconsideration attempting to end this case before going to trial.

For example, the Defendants filed motions to dismiss or for judgment on the pleadings. After the Court in May 1978 denied the motions of the Defendants for judgment on the pleadings or to dismiss, the Defendants filed in June of 1978 a Motion for Reconsideration of the Judge's May, 1978 Order and again sought dismissal or judgment on the pleadings. Subsequent to the Court's Order in September 1978 denying Defandants' Motion for Reconsideration, the Defendants filed a motion for a separate trial on the statute of limitations issue in October, 1978. After the Court entered its Order denying the request for a separate trial, the Defendants filed in 1980 motions to dismiss or in the alternative for summary judgment.

Subsequent to the Court's Order in December 1981 denying the Defendants' motions for summary judgment, the Defendants filed in August of 1982 another Motion to Dismiss or in the Alternative for a Stay of the Proceedings. The Court in April of 1983 entered an Order denying Defendants' Motion to Dismiss or in the Alternative for An Order to Stay of the Proceedings. After this Order the Defendants in October of 1983 filed a Motion for Reconsideration of the Court's Order denying them a separate trial on the issue of the statute of limitations. Defendants also filed in October 1983 another Motion for Reconsideration (the second Motion for Reconsideration) to reconsider the Court's Order denying summary judgment on the statute of limitations issue. This Court in February of 1984 entered its Order denying the

Defendants' second Motion for Reconsideration of the statute of limitations issue and summary judgment, and entered its Order denying Defendant's Motion for Reconsideration of a separate trial on the statute of limitations issue.

Plaintiffs will not go through in detail the prior history of this case, which the Plaintiffs are confident the Court is well aware. There can be no doubt after reviewing the record of this case that the delay in bringing this case to trial is not the fault of the Plaintiffs, and clearly lies at the doorstep of the Defendants.

Another consideration which the courts apply in weighing the issue of prejudgment interest is to take judicial notice of the decline in the purchasing value of the dollar since the acts complained of occurred as a result of inflation. Federal Rule of Evidence 201. There, of course, can be no argument as to the decline of the purchasing value of the dollar since September of 1969 as the result of inflation, and this Court may and should take judicial notice of this fact when it determines the appropriateness of an award of prejudgment interest and the amount of prejudgment interest. It must be remembered that the $2.6 Million award to the Plaintiffs is for damages as of the date of the merger in September 1969.

It also is clear that the Plaintiffs were deprived of the principal sum they have been awarded as damages for fifteen (15) years, and thus prejudgment interest would in fact be compensatory.

In determining whether to award prejudgment interest to the Plaintiffs, the following fact should be considered:

The jury's verdict necessarily included a finding that the defendants committed a fraud upon the plaintiff. As a result of this fraud, the plaintiff was deprived of the use of his money, and the defendants and the benefit of their fraud, for many years. *See, e.g., Holmes v. Bateson*, 583 F.2d 542, 564 (1st Cir. 1978). The plaintiff, therefore, *can only be made whole if prejudgment interest is awarded to him.*

Wilsmann v. Upjohn Company, supra, 572 F.Supp. at 245 (emphasis added and in original).

In *Norte & Company, supra,* 416 F.2d 1189, 1191 (2d Cir.) the court stated as follows:

However, as the corporation had been derprived of almost $3,000,000, the difference between the fair value of the stock issued and what it actually received, through the calculated fraud of the defendants, there was good reason for the district court to award interest as compensatory damages.

Norte & Company v. Huffines, supra, 416 F.2d at 1191.

In *Cant v. A. G. Becker & Co., Inc.,* 384 F.Supp. 814 (N.D. Ill. 1974), the court in a Federal Securities fraud case stated it this way:

"However, in light of a recent decision by the Court of Appeals of the Seventh Circuit and other decisions by federal courts in securities cases, *it is now clear that prejudgment interest may be awarded in situations wherein through the fault of another the plaintiff was deprived of beneficial use of its funds.*" (Citations omitted).

As Judge Cummings stated in *Mattigan* (*Mattigan, Inc. v. Goodman,* 498 F.2d 233 (7th Cir. 1974):

"Had plaintiffs not purchased the Fidelity stock, or purchased at a lower price, *they would have put the*

unused money somewhere, even if only in a savings account. Unlike the non-existence profits and division as a result of defendants' misrepresentations, *the chance to use their money elsewhere was actually lost to plaintiffs. . . .*"

Cant, supra, 384 F.Supp. at 815-816 (emphasis added) *quoting in part Mattigan, Inc., supra,* 498 F.2d at 240. The court in *Cant* like the other Federal Securities cases, awarded prejudgment interest to the plaintiffs assessed from the date of the purchase and thereafter on the aggregate loss incurred to the date of judgment. 384 F.Supp. at 816; *see* cases cited *supra.* The court pointed out:

The defendant was found to be the "wrongdoer" in a series of stock transactions which were the subject of the litigation. A. G. Becker & Company, Inc. had the use of the plaintiff's funds for an extended period of time.

384 F.Supp at 816.

As well stated by the court in *Cant*:

In lieu of rescission the Court still feels that plaintiff is entitled to an award of monetary damages sufficient to place him in the position he would have been had it not been for defendant's wrongful activity. Allowing damages, interest, and costs restores plaintiff to that position. *Plaintiff can only be made whole if placed in a posture which assumes that he had the opportunity to utilize his funds in a reasonable manner. The law does not permit defendants to obtain the beneficial use of plaintiff's funds at no cost to the wrongdoer.*

Cant, supra, 484 F.Supp. at 816 (emphasis added).

III. THE APPROPRIATE AWARD OF PREJUDGMENT INTEREST TO THE PLAINTIFFS

In determining the appropriate award of prejudgment interest to the Plaintiffs, the federal courts have recognized that they may award interest applying commercial market rates in order to compensate the Plaintiffs for the loss of the use of their money. In *Western Federal Corporation v. Davis, supra,* the court in a Federal Securities claim case stated the following:

> In light of the fact that the defendants violated the securities laws and that the plaintiffs have been deprived of the full use of the amounts paid, plaintiffs are entitled to recover prejudgment interest.

553 F.Supp. at 821. The court in *Western Federal* concluded that the appropriate rate of prejudgment interest to award the plaintiffs was based on the average rate that a consumer could have obtained in the money market during the two-year period in question. 553 F.Supp. at 821.

The court stated the following:

> ***This Court recognizes that it may award interest at the money market rate in an effort to compensate the plaintiffs for the loss of the use of their money.*** *See Johns Hopkins University v. Hutton,* 297 F.Supp. 1165, 1228 (citation omitted).

553 F.Supp. at 821 (emphasis added). The court pointed out that since the Federal Securities Act did not prescribe a legal rate of interest, "it has been ruled that the rate of interest imposed should '*compensate fairly the defrauded purchaser for the loss of the use of his money.*'" *Western Federal Corporation, supra,* 553 F.Supp. at 821 (emphasis

added), *quoting Johns Hopkins University v. Hutton,* 297 F.Supp. at 1229; *see Collier v. Granger,* 258 F.Supp. 717 (S.D.N.Y. 1966).

In *Johns Hopkins University v. Hutton,* 297 F.Supp. 1165 (D. Md. 1968), *aff'd in part & rev'd in part on other grounds,* 422 F.2d 1124 (4th Cir. 1970), *cert. denied,* 416 U.S. 916 (1974), the court approved an award of prejudgment interest in a Federal Securities claim case and recognized the commercial money market as appropriate to consider in determining the rate of prejudgment interest. In *Johns Hopkins* the Court rejected an automatic application of the legal rate of interest used by the state statute. After noting that prejudgment interest is used to compensate fairly the defrauded purchaser "for the loss of the use of his money", the court stated the following:

> *The comparative states of the money market at the times of purchase and of rescission are important factors in determining a compensatory rate of interest.* [Citations omitted].

The court in *Johns Hopkins* took judicial notice of the data submitted concerning the prime interest rates during the period from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. ***The court reviewed and analyzed the prime rate as demonstrating the reasonable level of return for a similar type of investment as made by the plaintiffs in that particular case.*** In *Johns Hopkins,* the court stated that the plaintiff was "an investor anticipating a return on its investment." 297 F.Supp. at 1229. In order to place the plaintiff in a position it would have been in were it not for the violations of the Federal Securities law of defendants "*an examination is required to determine what Hopkins [plaintiff]*

could reasonably have expected to earn by a similar type of investment." 297 F.Supp. at 1229 (emphasis added).

This is an approach used by many cases as cited in the *Johns Hopkins* decision, the *Western Federal Corporation case* and other cases cited *supra.* The Court in *Johns Hopkins* concluded that the plaintiffs could have reasonably expected to earn a certain percentage per annum on its investment from the time of the acts complained of until the date of judgment. 297 F.Supp. at 1230. The Court determined that since the purpose of awarding interest to the defrauded purchaser "is to compensate him for the amount which he could have safely earned by the use of his money," the choice of any date other than the date of which the fraudulent sale was made, "would amount to a decree of less than full compensation." 297 F.Supp. at 1233 and cases cited.

The Court in *Johns Hopkins* determined the appropriate rate of interest per annum based on what it believed plaintiffs could reasonably have expected as a return on the type of investment involved during that period of time, reviewing and analyzing the prime rate during the period of time, considering what the plaintiff could reasonably have expected to earn by a similar type of investment during that period of time, considering the contractual language involved in that case, and determining an appropriate rate of interest as compensation for the loss of the use of the money the plaintiff should have received. 297 F.Supp. at 1227-1230, 1233, *aff'd,* 422 F.2d 1124 (9th Cir. 1970).

Thus, the federal courts clearly have recognized that the appropriate prejudgment interest imposed should

"compensate fairly the defrauded purchaser for the loss of the use of his money," and that a court may award interest based on the commercial market rates and the prime rate in an effort to compensate the plaintiffs for the loss of the use of their money from the date of the acts complained of to the date of judgment.

Turning to the facts applicable in this case, Plaintiffs have concurrently filed herewith an Affidavit of Walter M. Singer with exhibits to provide the Court with interest rate calculations during the appropriate period of time from September 8, 1969 to the date of Judgment, January 30, 1985.

In determining the interest rate calculation for the period beginning September 8, 1969 to January 30, 1985, the principal amount used was $2,632,234 which is the amount of the Judgment entered in favor of the Plaintiffs in the above-styled action. The date of the entry of the Judgment is January 30, 1985. The beginning date for determining the calculations, September 8, 1969 is the date of the merger agreement entered into between the Plaintiffs and Defendant E. T. Barwick Industries, Inc. and the date upon which the $2,632,234.00 in compensatory damages was determined pursuant to the instructions of the Court.

The generally accepted and most appropriate method in determining interest rate calculations concerning the value of the use of money over a period of time for a similar type of investment as made by the Plaintiffs in this case is to apply the three-month Certificates of Deposit interest rate calculations from September 8, 1969 to January 30, 1985 on a compounded interest basis. [Affi-

davit of Walter Singer at ¶¶ 6, 7 and 18]. This approach is the most appropriate in determining the proper rate of interest because the Plaintiffs, as testimony shows at the trial, intended as their goal a long-term growth investment and savings by their purchase of Barwick stock in exchange for the sale of Cavalier Bag Company. Based on this approach, the appropriate amount of interest from September 8, 1969 to January 30, 1985 is the sum of $7,580,099.59, which is the calculation provided in ¶ 6 of the Affidavit of Walter M. Singer and attached thereto as Exhibit "B". This is the interest calculation using the three-month Certificates of Deposit interest rates from September 8, 1969 through January 30, 1985, on a compounded basis. The equivalent compounded annual interest rate over this period of time using this approach equals 8.9035%.

We have provided the Court for its convenience interest calculations using other approaches as shown in ¶¶ 8 through 16 of the Affidavit of Walter Singer and Exhibit "C" through "L" attached thereto. Plaintiffs strongly urge the Court to apply the interest calculation using the three-month Certificate of Deposit interest rates since that approach is the most appropriate and closely analogous approach to a similar type of investment as the Plaintiffs in this case. This approach would compensate the Plaintiffs for the loss of the use of their money and make whole the Plaintiffs for their loss. This approach based upon a review and analysis of the commercial money and capital market rates and the prime rate during the appropriate period of time is the rate of interest the Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time.

This is the most appropriate approach upon a consideration of fairness and all the other factors which have been discussed above and applied by the courts in determining the award of prejudgment interest to Plaintiffs in Federal Securities claim cases.

The average prime rate charged by banks over the period of time from September 1969 to January 30, 1985 is 10.15%. [*See* Affidavit of Walter M. Singer at ¶ 15 and Exhibits "J" and "K" attached thereto].

For the convenience of the Court Plaintiffs have provided the following chart of other interest calculations:

	Equivalent Annual Interest Rate	Total Interest
Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶ 7 and Exhibit "B" attached thereto]	$7,580,099.59	8.9035%
Annual Average of Three Month Certificates of Deposit (compounded) [Aff. of Singer at ¶ 8 and Exhibit "C" attached thereto].	$7,063,196.91	8.5589%
Three Month Certificates of Deposit (simple interest) [Aff. of Singer at ¶ 9 and Exhibit "D" attached thereto]	$3,614,171.77	8.919%

Annual Average Interest Rate—Three Month Certificates of Deposit (simple interest) [Aff. of Singer at ¶ 10 and Exhibit "E" attached thereto].	$3,597,382.62	8.8776%
Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 11 and Exhibit "F" attached thereto].	$7,169,596.11	8.7242%
Annual Average Six Month Prime Commercial Paper (compounded) [Aff. of Singer at ¶ 12 and Exhibit "G" attached thereto].	$6,746,720.34	8.4255%
Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 13 and Exhibit "H" attached thereto].	$3,544,988.90	8.7483%
Annual Average of Six Month Prime Commercial Paper (simple interest) [Aff. of Singer at ¶ 14 and Exhibit "I" attached thereto].	$3,498,903.90	8.6346%
Constant 7% (compounded annually) [Aff. of Singer at ¶ 16 and Exhibit "L" attached thereto].	$4,830,744.71	7.00%
Constant 7% (simple interest) [Aff. of Singer at ¶ 17 and Exhibit "M" attached thereto].	$2,836,538.63	7.00%

The interest calculations applying a 7% interest rate per annum from September 8, 1969 to January 30, 1985 compounded annually and utilizing a simple interest approach not compounded annually, are based on an application of O.C.G.A. § 7-4-2. The constant 7% interest rate clearly is not appropriate in this case based on the circumstances and facts in evidence, based on all the facts the Court must consider in determining an award of prejudgment interest, and based on a review and analysis of the cases recognizing the intent of an award of prejudgment interest to make the Plaintiffs whole and to provide them for the lost use of their money from the date of the acts complained of. A review and analysis of the prime rate (10.15%) and the commercial market interest rates during the appropriate period of time, and consideration of what Plaintiffs could reasonably have expected to earn by a similar type of investment during this period of time, mandate that the interest calculation applying a constant 7% rate is far too small and would not compensate the Plaintiffs for the loss of the use of their money. This case is in a unique situation due to the comparative states of the commercial market rates from the time of the acts complained to the date of judgment.

CONCLUSION

For all the above reasons and based on the record in this case, Plaintiffs respectfully request the Court to award the prejudgment interest from September 8, 1969 to the date of Judgment, January 30, 1985.

Respectfully submitted,

/s/

PAUL WEBB, JR.
Georgia State Bar No. 744650

/s/

HAROLD T. DANIEL, JR.
Georgia State Bar No. 204000

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Brief In Support of Plaintiffs' Motion for Award of Pre-Judgment Interest to all counsel of record by depositing a copy of same in the United States mail, with adequate postage affixed thereto, addressed as follows:

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This 11 day of February, 1985.

/s/

KEITH M. WIENER
Georgia State Bar No. 757475
Attorney for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs, v. E. T. BARWICK INDUSTRIES, INC., et al., Defendants.	CIVIL ACTION FILE NO. C75-1728A (Filed March 1, 1985)

NOTICE OF APPEAL

Notice is hereby given that Myles Osterneck, Guy Kenneth Osterneck and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the final Judgment entered in this action on the 30th day of January, 1985 in favor of Defendant E. T. Barwick and against the Plaintiffs on all claims and in favor of Defendant Ernst & Whinney and against the Plaintiffs on all claims, and from all previous non-final or interlocutory orders and all rulings which produced and preceded the final Judgment.

Dated: March 1, 1985

Respectfully submitted,

/s/ Paul Webb, Jr.
By /s/ Harold T. Daniel, Jr.
Georgia State Bar No. 744650

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al., Plaintiffs vs. E.T. BARWICK INDUSTRIES, INC., et al., Defendants	CIVIL ACTION FILE NO. C75-1728A

ORDER OF COURT

(Filed May 1, 1985)

On January 30, 1985, a judgment was entered in favor of defendant E. T. Barwick. On March 25, 1985, defendant Barwick filed a motion for extension of time to file his bill of costs. Barwick requests that the court extend the time for filing his bill of costs up to and including May 1, 1985.

Plaintiffs oppose said motion. Plaintiffs point out that Local Rule 255-7 provides:

> A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment. A bill of costs which is not timely filed will result in costs not being taxed as a part of the judgment.

Local rules of practice, such as Rule 255-7, "have the force and effect of law, and are binding upon the parties and the court which promulgated them until they are changed in the appropriate manner." *Woods Construction Co., Inc. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) (citations omitted).

Defendant Barwick's motion was filed 24 days after the date on which the bill of costs "must" have been filed. Additionally, Barwick did not seek an extension of time for compliance with Rule 255-7 until well after the date upon which the bill of costs was to have been filed. There is no doubt that Barwick failed to comply with the requirements of Local Rule 255-7. The time period established by Local Rule 255-7 is designed to provide a time limit for the conclusion of litigation in the trial court, is necessary for the orderly administration of cases, and is binding upon the parties. *In re Pin Oaks Apartments, Alleged Partnership*, 14 B.R. 16, 17 (S.D.Tex. 1981); *Woods Construction Co., Inc.*, 337 F.2d at 891. *Compare J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 102 F.R.D. 73, 77 (E.D.La. 1984) (untimely bill of costs permitted where case "not governed by any local rule").

Accordingly, defendant E. T. Barwick's motion for extension of time to file his bill of costs is hereby DENIED.[1]

SO ORDERED, this 29th day of April, 1986.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

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1 Plaintiffs were granted an extension of time to file their bill of costs in this action. However, said extension was granted pursuant to a consent motion and order which was filed prior to the expiration of the thirty-day limit set forth in Rule 255-7. Both of these facts distinguish the court's ruling with respect to plaintiffs' motion from the court's ruling as set forth hereinabove.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 85-8165

MYLES OSTERNECK, et al.,

Plaintiffs/Appellants,

v.

EUGENE BARWICK and ERNST & WHINNEY,

Defendants/Appellees,

B.A. TALLEY, M.E. KELLAR, and
E.T. BARWICK INDUSTRIES, INC.,

Defendants/Appellants,

v.

MYLES OSTERNECK, et al.,

Plaintiffs/Appellees/
Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STIPULATION OF DEFENDANT/APPELLANTS KELLAR AND TALLEY THAT PLAINTIFFS' MARCH 15, 1985 NOTICE OF CROSS-APPEAL WAS TIMELY FILED AND THAT THIS COURT HAS JURISDICTION

It is the position of Defendant/Appellants Buford A. Talley ("Talley") and M.E. Kellar ("Kellar") that the Cross-Appeal filed by the Plaintiffs/Appellees/Cross-Appellants (the "Ostenecks") on March 15, 1985 in the above-styled action was timely filed in accordance with the Federal Rules of Appellate Procedure. Defendant/

Appellants Talley and Kellar do not object to and stipulate that this Court has jurisdiction of the Cross-Appeal filed by the Osternecks on March 15, 1985.

This 6th day of May, 1985.

STIPULATED TO BY:
/s/ R. Hal Meeks, Jr.
R. Hal Meeks, Jr.
Georgia State Bar No. 500825
Attorney for Defendant/Appellant
Buford A. Talley

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/s/ Susan Hoy by RHN
by/express permission
Susan Hoy
Georgia State Bar No. 372850
Attorney for Defendant/Appellant
M. E. Kellar

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,)
)
Plaintiffs)
) CIVIL ACTION
vs.)
) FILE NO. C75-1728A
E.T. BARWICK INDUSTRIES)
INC., et al.,)
)
Defendants.)

ORDER OF COURT

(Filed July 1, 1985)

On January 30, 1985, a judgment in the amount of $2,632,234.00 was entered in favor of the plaintiffs and against defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley on federal securities law claims and state common law claims. At that time the plaintiffs requested that the court add prejudgment interest to that amount. The court deferred ruling on the matter of prejudgment interest and directed the parties to brief the issue. The parties have briefed the issue of prejudgment interest, and the court is now prepared to issue its ruling on plaintiffs' motion for award of prejudgment interest.

Defendants oppose plaintiffs' request for prejudgment interest, and in the alternative, argue that if it is allowed, any amount awarded should be less than the amount claimed by the plaintiff. Defendants further argue that whether prejudgment interest should be awarded should be determined by reference to Georgia law. It is

clear that "[i]n determining whether prejudgment interest is allowed on damages pursuant to Rule 10b-5, federal law governs." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *reh'g denied*, 478 F.2d 1403, *cert. denied*, 414 U.S. 975, *reh'g denied*, 414 U.S. 1104 (1973). *See also Alley v. Miramon*, 614 F.2d 1372, 1381 n.18 (5th Cir. 1980); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 103 S.Ct. 683 (1983); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 595 F. Supp. 171, 172 (M.D.Fla. 1984). It is also clear that "whether prejudgment interest should be awarded on a damage recovery in a Rule 10b-5 action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d at 479.[1] Defendants' reliance on *United States ex rel. Georgia Electrical Supply v. U.S. Fidelity & Guaranty Co.*, 656 F.2d 993 (5th Cir. 1981), and other cases which suggest that state law (and the interest-on-liquidated-damages-only rule) provides the standard by which prejudgment interest should be awarded, is misplaced as those cases did not arise in the context of federal securities law violations but involved other federal statutes and causes of action thereunder.

Plaintiffs contend that the interest should be calculated for the period September 8, 1969 to January 30, 1985 (date of merger to date of judgment). The plaintiffs have suggested ten alternative rates at which prejudgment in-

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[1] As to the state law claims, however, Georgia law governs. *George R. Hall, Inc. v. Superior Trucking Company, Inc.*, 532 F. Supp. 985, 998 (N.D.Ga. 1982). In the instant case, involving unliquidated damages, prejudgment interest on a state law claim is precluded by Georgia law. *See* O.C.G.A. § 51-12-14.

terest might be calculated. This is a matter about which there has been considerable discussion. "Most cases do not explain the reason for use of a particular interest rate, but merely adopt the state interest rate without further discussion." Jacobs, *The Measure of Damages in Rule 10b-5 Cases*, 65 Georgetown L.Rev. 1093, 1161 (1977). Further, the cases show a wide range in the amount of interest awarded. *Id.* at 1161 n. 369. The alternative interest rates presented by the plaintiffs would result in prejudgment interest calculations ranging from a low of $2,836,536.63 (7% simple interest) to a high of $7,580,099.59 (three-month certificates of deposits compounded). *See* Appendix A attached thereto.

As stated in *Wolf v. Frank, supra*, the matter as to whether or not to award prejudgment interest in a federal securities fraud case rests in the sound discretion of the district court, and any ruling on the issue should be based upon fundamental considerations of fairness. An award of prejudgment interest is a part of compensatory damages, but the compensatory nature of such an award must be "tempered by an assessment of the equities." *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2nd Cir. 1969). In awarding prejudgment interest, the district court must take care to determine that such an award is not punitive in nature. *See Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (2nd Cir. 1975).

The court has determined that upon a consideration of the facts and circumstances herein involved that an award

of prejudgment interest in this case is in order,[2] but in an amount considerably less than that claimed by the plaintiffs. The court further concludes that any award of prejudgment interest in an amount in excess of the jury award of damages or for the full period claimed (approximately fifteen years) would be *punitive* rather than compensatory. In the first instance, much of the delay in getting this case in a posture where it could be presented to a jury can be attributed to the plaintiffs. There was some delay on the part of the plaintiffs in filing the law suit after they were put on notice that a cause of action existed. Also, the lawsuit was pending for a period of nine years from the filing to the beginning of the trial. A substantial part of the delay can be attributed to the actions or lack of action on the part of the plaintiffs. It should be noted that the plaintiffs changed lead counsel two times after the original lead counsel withdrew from the case. This is not to say that other delay was not caused by action or failure to act by various defendants. There are also examples of delay in the progress of bringing this case to trial which were agreed upon by the parties. There was tacit agreement between the parties that action of the district court on certain motions be stayed for a period of time pending a ruling by the Court of Appeals on an issue important to this case. Another matter which contributed to some delay is the fact, that due to changes in

[2] In an effort to make a party whole, an award of prejudgment interest is particularly appropriate in cases involving investment fraud and breach of fiduciary duties. *See Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith,* 595 F. Supp. 171, 174 (M.D.Fla. 1984) and the cases cited therein at p. 174.

judicial personnel in this district, this case has been assigned to five different district judges at various times.

The court agrees with the plaintiffs that the overall period of time involved in any interest calculation is from September 8, 1969 to January 30, 1985 (date of merger to date of judgment).

Upon giving due consideration to the ten alternate rates of interest presented by the plaintiffs, the court is persuaded that only the use of the constant 7% (simple) interest rate would be fair and reasonable in this case, given the protracted period of time involved.[3] In effect, the court has determined that the Georgia statutory rate is more appropriate than the other rates suggested by the plaintiffs. *See* O.C.G.A. § 7-4-2. In order that the award of prejudgment interest in this case not be deemed to be punitive in nature, the court further determines that an award of only one-third of the total amount arrived at by applying the interest rate of 7% to the jury award for the full period of time may be recovered. Accordingly, the plaintiffs are entitled to recover as prejudgment interest on the federal securities claim in the amount of $945,-512.85. Due to the unliquidated nature of plaintiffs' claims, the plaintiffs are not entitled to recover prejudgment interest on the amount awarded under the Georgia common law fraud claim.

[3] In making the ruling hereinabove as to the rate interest to be applied in this case, the court is not unmindful of the cases cited in Part III of plaintiffs' brief, such as *Johns Hopkins University v. Hutton,* 297 F. Supp. 1165 (D.Md. 1968) and like cases. The court has simply determined that the average money market approach is not appropriate in this case.

It is hereby **ORDERED** and **ADJUDGED** that plaintiffs shall recover of defendants E. T. Barwick Industries, Inc., M. E. Kellar, and B. A. Talley an award of prejudgment interest in the amount of Nine Hundred Forty-Five Thousand Five Hundred Twelve Dollars and Eighty-Five Cents ($945,512.85). Therefore, final judgment in this case shall be AMENDED to reflect this additional award of prejudgment interest on the federal securities claim.

SO ORDERED, this 1st day of July, 1985.

/s/ Horace T. Ward
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK,

Plaintiffs,

vs.

E.T. BARWICK INDUSTRIES, INC., E.T. BARWICK, M.E. KELLAR, B.A. TALLEY and ERNEST AND ERNEST,

Defendants.

CIVIL ACTION

NO. C75-1728A

AMENDED JUDGMENT

The judgment heretofore entered in the above-stated case on January 30, 1985, is hereby amended by adding thereto "that plaintiffs, MILES OSTERNECK, GUY-KENNETH OSTERNECK, ROBERT OSTERNECK, MYLES OSTERNECK and GUY-KENNETH OSTERNECK AS TRUSTEES FOR THE BENEFIT OF ROBERT OSTERNECK, shall recover of defendants, E. T. BARWICK INDUSTRIES, INC., M. E. KELLAR, and B. A. TALLEY an award of prejudgment interest in the amount of NINE HUNDRED FORTY-FIVE THOUSAND FIVE HUNDRED TWELVE and 85/100 DOLLARS ($945,512.85) on the federal securities claim", and that said judgment remain the same in every other respect.

Dated at Atlanta, Georgia, this 9th day of July, 1985.

FILED AND ENTERED
IN CLERK'S OFFICE
JULY 9, 1985
LUTHER D. THOMAS, Clerk
By /s/ B. D. Hatcher
Deputy Clerk

LUTHER D. THOMAS, Clerk
By: /s/ Barbara D. Hatcher
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MYLES OSTERNECK, et al.,	)
	)
Plaintiffs,	)
	) CIVIL ACTION
v.	)
	) FILE NO.
E. T. BARWICK	) C75-1728A
INDUSTRIES, INC., et al.,	)
	) (Filed July
Defendants.	) 31, 1985)

NOTICE OF CROSS-APPEAL AGAINST M. E. KELLAR, BUFORD A. TALLEY, E. T. BARWICK INDUSTRIES, INC., AND E. T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST & COSTS AWARDED TO PLAINTIFFS

NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M. E. Keller, Buford A. Talley, E. T. Barwick Industries, Inc. and E. T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's Orders dated July 1, 1985 which provide the interest and costs warded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and Bill of Costs, from that portion

of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interlocutory orders and all rulings which produced and preceded these Orders and Judgments.

This 31 day of July, 1985.

Respectfully submitted,

/s/ Paul Webb, Jr.
Georgia State Bar No. 744650

/s/ Harold T. Daniel, Jr.
By /s/ KW
Georgia State Bar No. 204000
/s/ Keith M. Wiener
Georgia State Bar No. 757475
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8165, 85-8523 & 85-8593

MYLES OSTERNECK, et al.,	Plaintiffs-Appellants, Cross-Appellees,
versus	
E.T. BARWICK INDUSTRIES,	Defendant-Appellee, Cross-Appellant,
E.T. BARWICK,	Defendant,
M.E. KELLAR,	Defendant-Appellee, Cross-Appellant,
BUFORD TALLEY,	Defendant-Appellee, Cross-Appellant,
ERNST & WHINNEY,	Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

(Filed Oct. 30, 1985)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

The jurisdictional questions are carried with the cases.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants.

Ernst & Whinney, Defendant-Appellant.

Myles OSTERNECK, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

E.T. BARWICK INDUSTRIES, INC., et al.,
Defendants,

Melvin E. Kellar and Buford A. Talley,
Defendants-Appellants, Cross-Appellees.
Myles OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

E.T. BARWICK INDUSTRIES, INC.,
Defendant.
E.T. Barwick, Defendants,

M.E. Kellar, Defendant-Appellant,
Cross-Appellee,

Buford Talley, Defendant-Appellant,
Cross-Appellant.

Ernst & Whinney, Defendant-Appellee,
Cross-Appellant.

Nos. 85-8523, 85-8593 and 85-8165.

United States Court of Appeals,
Eleventh Circuit.

Aug. 31, 1987.

Appeals from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Over seventeen years ago, in September 1969, Cavalier Bag Company, Inc., merged into E.T. Barwick Industries, a subsidiary of the Barwick Corporation. Various members of the Osterneck family, plaintiffs in this action, were, at that time, owners of Cavalier. Pursuant to the merger, the Ostenecks exchanged their stock in Cavalier for Barwick Industries stock.

Sometime later the Ostenecks became aware of allegedly frudulent misrepresentations made to them in order to secure their approval of the merger. Specifically, they came to believe that Barwick Industries' financial statements for the two years preceding the merger misrepresented the company's financial condition. Consequently, on September 4, 1975, the Ostenecks began this action alleging violations of §§ 10(b) and 20 of the Securities Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10(b)(5) thereunder (17 C.F.R. § 240.10b-5) and the common law of Georgia.

Besides Barwick Industries, the Ostenecks named as defendants several other individuals and organizations. Of these only four remain parties to this appeal: E.T. Barwick, B.A. Talley, and M.E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger and Ernst & Whinney ("E & W"), the accountants responsible for preparing the allegedly fraudulent statements misrepresenting the financial condition of Barwick Industries.[1]

Following almost ten years of discovery, this case finally went to trial in October, 1984. After three and a

1. The financial statements were actually prepared by Ernst & Ernst. Since that time, however, the accounting firm has changed its name to Ernst & Whinney.

half months of testimony, the jury returned a verdict against defendants Barwick Industries, M.E. Kellar, and B.A. Talley in the amount of $2,632,234 as compensatory damages for violations of federal securities law and Georgia state common law. Judgment was entered in favor of E & W and E.T. Barwick, individually. Subsequently, the district court awarded the Ostenecks pre-judgment interest on their federal securities claim in the amount of $945,512.85. These consolidated appeals ensued.

Tangled procedural maneuvering has created three separate appellate cases. For clarity's sake we briefly characterize them here: Case No. 85-8165 involves the Ostenecks' appeal from all judgments rendered against them and includes the cross-appeals of most of the defendants. Case No. 85-8593 involves only the appeal by Barwick Industries, E.T. Barwick, Talley and Kellar and the Ostenecks' cross-appeal against those parties. Case No. 85-8523 is an appeal by E & W from the district court's denial of expert fees in E & W's bill of costs.

I. JURISDICTION

As an initial matter, we confront several difficult jurisdictional questions. These difficulties arise out of the complicated procedural maneuvering which occurred following the initial entry of judgment against defendants Barwick Industries, Kellar and Talley. This first judgment for over two and a half million dollars was entered on January 30, 1985. At that time the Ostenecks moved orally for the award of pre-judgment interest. On February 11, 1985, the Ostenecks filed a written motion for prejudgment interest. During March 1985, the various parties filed notices of appeal and cross-appeal chal-

lenging the Janaury 30, 1985 judgment, including the Ostemecks' March 1, 1985 notice of appeal.[2] It was not, however, until July 1 that the district court entered an order ruling upon the Osternecks' February 11 motion and awarding the Osternecks over $945,000 in prejudgment interest. A separate judgment, captioned as an "amended judgment," was entered on July 9. Following this amended judgment various notices of appeal and cross-appeal were filed. The Osternecks' filed only a single notice of appeal on July 31, 1985, which was captioned as a cross-appeal against Kellar, Talley, E.T. Barwick and Barwick Industries. The notice did not designate E & W as a party to the appeal.[3]

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2. In addition to the Osternecks' notice of appeal, Talley and Kellar also filed notices of appeal on March 1, 1985. On March 15, E & W filed a cross-appeal against the Osternecks and the Osternecks cross-appealed against Talley and Kellar. On March 28, the Osternecks cross-appealed against Barwick Industries.

3. In full, the notice of appeal read:

NOTICE OF CROSS-APPEAL AGAINST M.E. KELLAR, BUFORD A. TALLEY, E.T. BARWICK INDUSTRIES, INC., AND E.T. BARWICK FROM THAT PORTION OF THE COURT'S ORDERS AND AMENDED JUDGMENT WHICH PROVIDE THE PREJUDGMENT INTEREST AND COSTS AWARDED TO PLAINTIFFS

NOTICE IS HEREBY GIVEN that Myles Osterneck, Guy Kenneth Osterneck, and Robert Osterneck, and Myles Osterneck and Guy Kenneth Osterneck as Trustees for the benefit of Robert Osterneck, Plaintiffs in the above-styled action, hereby cross-appeal against M.E. Kellar, Buford A. Talley, E.T. Barwick Industries, Inc. and E.T. Barwick to the United States Court of Appeals for the Eleventh Circuit, from the portions of the Court's orders dated July 1, 1985 which provide the interest and costs awarded to Plaintiffs regarding Plaintiffs' Motion for Prejudgment Interest and

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A. *Cases Nos. 85-8165 & 85-8593*

These cases raise two interrelated jurisdictional issues. First, we must examine the effect and validity of the Osternecks' March 1, 1985 notice of appeal, and the other appeals and cross-appeals filed by the defendants during March 1985. The parties agree that if these notices were effective they would be sufficient to raise all issues the Osternecks seek to litigate on appeal. However, defendants Talley, Kellar, and E & W contend that these notices were ineffective because they were filed while a Rule 59(e) motion was pending before the district court. If the Osternecks' March 1, 1985 notice of appeal, and the other appeals and crossappeals filed in March 1985 are deemed ineffective, we must next decide whether the Osternecks' second notice of appeal filed on July 31, 1985, effectively preserved all issues for appeal.[4] Defendants Talley, Kellar, and E & W argue that this second notice of appeal did not preserve all the issues which the Osternecks now seek to litigate.[5]

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Bill of Costs, from that portion of the Amended Judgment filed and entered on July 9, 1985 which provides the prejudgment interest awarded to Plaintiffs and from all previous non-final or interelocutory orders and all rulings which produced and preceded these Orders and Judgments.

This 31 day of July, 1985.

Record on Appeal, vol. 24, Tab 511.

4. It is uncontested that the appellants Barwick Industries, E.T. Barwick, Talley and Kellar filed effective, timely second notices thereby preserving their appeals. As will appear below, however, E & W has foregone its right to appeal.

5. The Osternecks argue that the defendants are estopped to deny this court's jurisdiction, having originally conceded that jurisdiction for this appeal existed. However, it is well settled

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It is settled law that a notice of appeal filed while a motion to alter or amend the judgment under Rule 59(e) is pending can have no effect. *See* Fed.R.App.P. 4(a)(4);[6] *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Robinson v. Tanner*, 798 F.2d 1378, 1385 (11th Cir.1986). Thus, the jurisdictional question posed by this case is a clear one: should the Ostenecks' February 11 motion for prejudgment interest be characterized as a motion, pursuant to Fed.R.Civ.P. 59(e), to alter or amend the district court's judgment. Because we conclude that this motion for discretionary prejdugment interest is properly characterized as a motion to alter or amend a final judgment of the district court, all notices filed in this case prior to the ruling on that motion, i.e., July 9, 1985, have no effect.

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that, as courts of limited jurisdiction, federal courts are obliged to undertake a jurisdictional inquiry whenever it appears that, in fact, no jurisdiction exists. *Blake v. Zant*, 737 F.2d 925, 926 (11th Cir.1984), *on reh'g*, 758 F.2d 523, *cert. denied*, — U.S. —, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981). Thus, any prior stipulation by the parties notwithstanding, the issue of our jurisdiction is now before us and must be addressed.

6. In relevant part, this rule reads:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying . . . such motion. A notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . .

Fed.R.App.P. 4(a)(4).

Our conclusion that a motion for prejudgment interest is a Rule 59(e) motion is influenced by several factors. First and foremost amongst these is the settled treatment of such motions by the other circuit courts of appeal They have uniformly concluded that a motion for discretionary prejudgment interest must be filed pursuant to Rule 59(e). *See Stern v. Shouldice*, 706 F.2d 742, 746-47 (6th Cir.), *cert. denied*, 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-47 (2d Cir.1982); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 152-54 (1st Cir.1980).

This result may be easily explained. The discretionary award of prejudgment interest requires the district court to substantively reconsider its original judgment. This is precisely the sort of alteration or amendment contemplated by Rule 59(e). Such substantive modifications must be sought within ten days of the entry of judgment[7] and any decision rendered prior to disposition of the motion is not final for purposes of appeal. The rules of appellate procedure are designed to prevent precisely what has occrured in this case—the piecemeal appeal of nonfinal substantive judgments rendered by the district court.[8]

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7. The Ostenecks' motion, served on February 11, 1985, was served within the ten-day time limit prescribed by Fed.R.Civ.P. 59(e). The tenth day after judgment actually fell on Saturday, February 9, and an extension until Monday was proper. Fed. R.Civ.P. 6(a).

8. One narrow exception to the general rule that motions for prejudgment interest should be treated under Rule 59(e) may exist. When the substantive law upon which the district court's judgment is based mandates an award of prejudgment

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The Osternecks argue, however, that their motion is not within the scope of Rule 59(e) because it addresses an issue collateral to the main cause of action. As support for this proposition, they cite *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), in which the Supreme Court held that a post-judgment motion for an award of attorney's fees under 42 U.S.C. § 1988 was not governed by Rule 59(e).

Reliance upon *White* is misplaced. In *White*, the Court noted that an award of attorney's fees under § 1988 is "uniquely separable" from the main cause of action and, " 'does not imply a change in the judgment.' " *Id.* at 452, 102 S.Ct. at 1166 (quoting *Knighton v. Watkins*, 616

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interest, its omission from the judgment may be corrected as a clerical error by motion brought pursuant to Fed.R.Civ.P. 60(a). *See Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir.1972). The discretionary award of prejudgment interest can never fall within this exception. *See Goodman*, 682 F.2d at 45-46; *Scola*, 618 F.2d at 153. As the Osternecks have conceded, the award of prejudgment interest in this case was wholly within the district court's discretion. Neither the federal securities law nor the state common law fraud claims litigated by the Osternecks mandated the award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 457, 7 L.Ed.2d 403 (1962); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir.1981). Moreover, to the extent that any such exception to the general rule exists, the former Fifth Circuit has, in dicta, rejected this exception. *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1213 n. 4 (5th Cir.1976) ("To the degree these cases hold that interest which is added as a matter of right can always be corrected under Rule 60(a), we believe they should be rejected.") (binding precedent, *see infra* note 10). Of course, when an improper legal rate of interest is set by the district court, a party may also seek relief from the legally erroneous judgment under Rule 60(b). *Id.* at 1212-13.

F.2d 795, 797 (5th Cir.1980)). Our circuit has interpreted this to mean that Rule 59(e) applies only when a motion seeks reconsideration of substantive issues resolved in the judgment and not when a motion raises exclusively collateral questions regarding what is due because of the judgment. *See Lucas v. Florida Power & Light Co.*, 729 F.2d 1300, 1301 (11th Cir.1984). Thus, we have even concluded that the issue of attorney's fees is not always collateral to the action. When the liability for the award arises from a substantive contractual obligation and is "an integral part of the merits of the case" and therefore " 'compensation for the injury giving rise to an action,' " a motion for the inclusion of attorney's fees is a Rule 59(e) motion and tolls the time period for appeal. *C.I.T. Corp. v. Nelson*, 743 F.2d 774, 775 (11th Cir.1984) (quoting *White*, 455 U.S. at 452, 102 S.Ct. at 1166-67); *accord Beckwith Machinery Co. v. Travelers Indemnity Co.*, 815 F.2d 286 (3d Cir.1987). *But see Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 282-94 (7th Cir.1985).

It cannot be doubted that prejudgment interest is compensation which directly stems from the injury giving rise to the action. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir.1969); *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Thus, a motion to award prejudgment interest requests a substantive alteration of a court's judgment and must be made pursuant to Rule 59(e). Hence, in the instant case, the district court's judgment was not made final until the entry of its

amended judgment on July 9, 1985, and all notices of appeal filed prior to that date were ineffective.[9]

In order to avoid the effects of this ruling, the Ostemecks argue that their original notices of appeal and cross-appeal filed in March are, nonetheless, effective because they fall within the scope of two special exceptions which validate premature notices of appeal. First, they argue that an interlocutory appeal from a nonfinal decision may, nonetheless, be treated as an appeal from a final order if the nonfinal judgment has subsequently been finalized. *See Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir.1973);[10] *cf. Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980). However, *Jetco* holds only that a "premature notice of appeal is valid if filed from an order dismissing a claim or party and followed by a subsequent final judgment without a new notice of appeal being filed. *Robinson*, 798 F.2d at 1385 (footnote omitted). In this case, the earlier nonfinal order was not one which dismissed a

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9. As an alternative to this resolution, E & W urges us to adopt the per se rule recently announced by the Fifth Circuit in *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). That court concluded that any post-judgment motion served within ten days of the entry of judgment (except a motion to correct purely clerical errors under Rule 60(a)) would be treated as a motion under Rule 59(e). *Id.* at 667. Absent en banc reconsideration by our own court, we are not free to adopt this bright line rule. Moreover, our own distinction between collateral and noncollateral matters is sufficient for the purpose at hand and achieves the same result as that suggested by *Horcan's* per se rule.

10. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

claim or a party. Rather, it only rendered judgment upon a jury verdict. Thus, the Ostemecks' premature appeal does not fall within the scope of the *Jetco* rule. Moreover, in *Martin v. Campbell*, 692 F.2d 112, 114-16 (11th Cir. 1982), this court determined that *Jetco* could not validate a premature notice of appeal which was filed while a Rule 59 motion was pending. We concluded that Fed.R.App.P. 4(a)(4) spoke directly to the validity of such appeals and precluded validation of a premature notice under *Jetco's* equitable exception.

As a final argument, the Ostemecks contend that they fall within the "unique circumstances" exception to the timely appeal requirement. This exception, developed by the Supreme Court in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) (per curiam), commands that an appellate court "should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n. 2 (7th Cir. 1985) (citation omitted).

The Ostemecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the executions of the January 30 judgment. In addition, the clerk of the district court required the Ostemecks to pay an additional filing fee for their notice of cross-appeal filed after the

district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed.R.App.P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable.

We do not believe that any of these factors are sufficient to create the "unique circumstances" necessary to validate a premature appeal. At no time has the district court or this court every affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such an assurance from either court. Indeed, the *Thompson* exception is designed to permit an appeal when a party has done an act which, if properly done, would postpone the deadline for filing his appeal and has been assured by a judicial officer that this act has been properly done. *Thompson*, 375 U.S. at 387. The Osternecks do not suggest that any court officer has ever assured them that they have been granted an extension of time within which to file an appeal.[11]

11. Moreover, to the extent the Osternecks may have erroneously relied upon the actions of the district court, they did so despite the district court's express statements that the judgment would have to be "amended" to include prejudgment interest. *See* Record on Appeal, vol. 82 at 8497 ("if prejudgment interest is granted it will be—the judgment can be amended"); *cf. id.* vol. 24, Tab 508 (entering "amended judgment" awarding prejudgment interest). Rule 59(e) is, of course, the only vehicle by which prior district court judgments may be "amended."

For the foregoing reasons, we conclude that we do not have jurisdiction to hear the appeal in Case No. 85-8165 (i.e., the Osternecks' March 1, 1985 appeal and the defendants' cross-appeal during March 1985). That appeal is accordingly ordered dismissed.[12]

Having concluded that all of the notices of appeal filed prior to the district court's amended judgment on July 9, 1985 are ineffective, we must next determine the efficacy of the Osternecks' subsequent notice of cross-appeal filed on July 31, 1985. The Osternecks contend that, even though their appeal in Case No. 85-8165 may be dismissed, all the issues they seek to litigate in that ap-

12. In an effort to resuscitate their appeal, the Osternecks have made several motions. First, they seem to have requested that we order the district court to grant them an extension of time in which to file their appeal. Though the district court may entertain such a motion, an appellate court is expressly prohibited from enlarging the time for filing a notice of appeal. Fed.R.App.P. 26(b). In the alternative the Osternecks' motion may be construed as a request that this court stay its hand and permit a limited remand so that the district court may determine whether an extension of time is appropriate. This we decline to do. The need for the orderly disposition of appeals indicates that such limited remands are strongly disfavored and the Osternecks have suggested no reason why the district court could not as readily deal with a motion for an extension following our dismissal of the instant appeal. Indeed, there is currently pending before the district court a motion for an extension of time in which to file an appeal. The district court has deferred ruling on this motion pending our disposition of this appeal. *United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir.1979). Following this dismissal, the district court may entertain the Osternecks' motion. The grant or denial of such a motion is entrusted to the district court's sound discretion. *Wansor v. George Hantscho Co.*, 570 F.2d 1202, 1205-07 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978); *In re O.P.M. Leasing Services*, 769 F.2d 911 (2d Cir.1985).

peal are preserved for litigation in Case No. 85-8593 by their July 31 notice. By its terms, however, this notice of cross-appeal does not expressly raise any issues for appeal against E & W. E & W contends that the failure to name them in the notice of appeal renders the notice ineffective insofar as it seeks to raise any issues on appeal against E & W. We agree.

The general rule in this circuit is that an appellate court has jurisdiction to review only those judgments, orders or portions thereof which are specified in an appellant's notice of appeal. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir.); *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983); Fed.R.App.P. 3(c) (requiring that a notice of appeal "designate the judgment, order or part thereof appealed from"). *But see Lynn v. Sheet Metal Workers*, 804 F.2d 1472, 1481 (9th Cir.1986). Although we generally construe a notice of appeal liberally, we will not expand it to include judgments and orders not specified unless the overriding intent to appeal these orders is readily apparent on the face of the notice. We have previously concluded that, where some portions of a judgment and some orders are expressly made a part of the appeal, we must infer that the appelllant did not intend to appeal other unmentioned orders or judgments. *Mestre*, 701 F.2d at 1374-75; *see also C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055-56 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 974, 71 L.Ed.2d 112 (1981).[13]

13. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

We conclude that an analogous rule would apply when an appellant expressly names some of his opponents but fails to include other opposing parties within the notice of appeal. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir.1977) (depriving appellate jurisdiction with respect to defendants not named in notice of appeal); *Parrish v. Board of Commissioners*, 505 F.2d 12, 15-16 (5th Cir.1974) (notice naming appellants "PARRISH, ET AL., Plaintiffs" sufficient to demonstrate that all plaintiffs intended to appeal), *vacated*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (1975), on remand, 533 F.2d 942, 945 (1976) (deeming issue mooted by filing of curative notice of appeal). Since the text of the Osternecks' July 31, 1985 notice, *see supra* note 3, expressly preserves an appeal against Barwick, Barwick Industries, Talley and Kellar, we must, by inference, conclude that the Osternecks chose to forego any appeal against E & W.

Moreover, to now permit the Osternecks to use their July 31 notice as a vehicle for an appeal against E & W would unfairly prejudice E & W. No doubt relying upon the Osternecks' failure to appeal the judgment in its favor, E & W has foregone any cross-appeal it might have had. A cross-appeal, had one been filed, could have raised many of the issues which we will address in connection with Case No. 85-8593. Indeed, when the Osternecks had earlier appeared to perfect an appeal against E & W by their March 1 notice of appeal, E & W promptly filed a notice of cross-appeal on March 15. Thus, it is evident that E & W has reasonably relied upon the fact that the Osternecks did not name them in their July 31 notice. To allow the Osternecks to now use that notice to raise an appeal against E & W would be inequitable.

Consequently, the issues the Osternecks seek to litigate against E & W are not preserved in Case No. 85-8593.

As our discussion makes plain, however, we do have jurisdiction over Case No. 85-8593, because the notices of appeal were filed after the district court entered its final judgment. The scope of these notices expressly embraces the appeals by Barwick Industries, E.T. Barwick, Talley and Kellar as well as the Osternecks' July 31, 1985 cross-appeal against those parties. Talley and Kellar have argued that the Osternecks' second notice specified only that portion of the final judgment relating to prejudgment interest and thus did not raise against them any issues other than the propriety of the prejudgment interest award expressly mentioned in the notice. We need not address this argument, however, because in this appeal against Talley and Kellar, the Osternecks have briefed only the prejudgment issue and have, consequently, abandoned any other assignments of error against Talley and Kellar. *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir.1980). All parties agree that the July 31, 1985 notice was sufficient to permit the Osternecks to appeal from the district court's order which awarded prejudgment interest only on the federal securities claim and reduced by two-thirds the amount of interest requested by the Osternecks. Thus, all issues raised by the Osternecks in case No. 85-8593 against Talley and Kellar are properly before us, as well as the issues raised by the Talley and Kellar appeals, and we have jurisdiction to hear the case.[14]

14. The Osternecks' cross-appeal also names Barwick Industries and E.T. Barwick and manifests an intent to appeal against

(Continued on following page)

B. *Case No. 85-8523*

This case presents a slightly different issue of appellate jurisdiction. On May 22, 1985, while the Osternecks' motion for prejudgment interest was pending before the district court, the district court ruled on E & W's motion for costs incurred while successfully defending against the Osternecks' action. In this order, the district court concluded that it was without authority to award fees for expert witnesses beyond the nominal statutory amount recoverable under 28 U.S.C. § 1821.[15] On June 21, 1985, E & W appealed from the district court's May 22 order.

Though orders awarding or denying costs are not ordinarily appealable, *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82-83, 44 S.Ct. 481, 482-83, 68 L.Ed. 909 (1924), when the refusal to tax an item of cost is not based upon an exercise of discretion but rather upon a district court's conclusion that it lacked the power to tax costs that order is appealable. *See McWilliams Dredging Co. v. Department of Highways*, 187 F.2d 61 (5th Cir.

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those parties. Nowhere in their briefs, however, have the Osternecks sought to raise any issue on appeal against Barwick Industries. Nor could they be deemed to have raised any beyond those asserted against Talley and Kellar, Barwick Industries' codefendants. Insofar as the Osternecks' briefs on appeal raise issues challenging the validity of the verdict in favor of E.T. Barwick, those issues are properly presented to us and we have jurisdiction to consider their merits as part of Case No. 85-8593. However, these issues have no merit. *See infra* n. 18.

15. This ruling accords with our circuit's prior decision in *Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285 (11th Cir.1983). The Supreme Court has recently confirmed that our interpretation of the law is correct. *See Crawford Fitting Co. v. J.T. Gibbons*, — U.S. —, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987).

1951). Moreover, it is evident that an appeal respecting costs is an appeal of a collateral matter which does not seek reconsideration of substantive issues before the court. *Lucas*, 729 F.2d at 1301. Thus, our analysis above suggests that E & W's appeal is of a collateral matter and that a request for costs is not a motion under Rule 59(e).

This, however, does not dispose of the question. Simply because an order, such as an order taxing costs, is generally appealable it does not follow that any particular order is appealable. In this case, the order appealed from was entered prior to the district court's final disposition of all substantive issues in the case. This exactly reverses the typical procedure contemplated by Fed.R.Civ.P. 58, which provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs."

By statutory authority, this court has jurisdiction only of appeals from final decisions of the district courts. 28 U.S.C. § 1291.[16] We may not hear appeals even from fully consummated decisions when they are but steps towards a final judgment into which they merge. We see no reason for concluding that the order taxing costs against the Ostornecks was anything but such an intermediate step that merged into the subsequent July 9 final judgment of the district court and was appealable only at that time. Hence, E & W's appeal must be dismissed as an appeal from a nonfinal order of the district court.

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16. This statutory grant of appellate jurisdiction provides that:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. . . .

28 U.S.C. § 1291.

Nor can E & W seek to avoid the finality rule by application of the *Cohen* doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) (permitting appeal of certain nonfinal collateral issues). In the first place, it is not at all apparent that the *Cohen* doctrine can ever apply to notices of appeal filed during the pendency of a Rule 59 motion, such as the Osternecks' motion for prejudgment interest in this case. By its very terms, Rule 4(a)(4) mandates that "the time for appeal for *all* parties" shall run from the entry of an order granting or denying a Rule 59 motion. Fed.R.App.P. 4(a)(4) (emphasis supplied). Thus, one might conclude that the express terms of Rule 4(a)(4) render any notice of appeal filed during the pendency of a Rule 59 motion a nullity, no matter what that notice's otherwise appealable character.

We need not sweep so broadly in our ruling, however. Indeed we assume *arguendo* that the *Cohen* doctrine, if applicable, would validate a notice of appeal from a nonfinal collateral order filed during the pendency of a Rule 59 motion. However, it is evident that E & W's appeal of the order taxing costs does not meet the stringent requirements of the *Cohen* doctrine. In order for a nonfinal order to be appealable as a collateral matter under the *Cohen* doctrine, it must be clear that awaiting a timely appeal from the complete final judgment would effectively prevent review of the order in question. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978). *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1225-26. No suggestion has been made, nor could one be, that the district court's order taxing costs would be unre-

viewable had E & W awaited final judgment before taking its appeal. Consequently, the *Cohen* doctrine is inapplicable.

For the foregoing reasons we conclude that the appeal in Case No. 85-8523 must be dismissed for want of jurisdiction because it is an appeal from a nonfinal order of the district court.

II. CASE NO. 85-8593—THE MERITS

Having concluded that we have jurisdiction only to determine the merits of Case No. 85-8593, we now turn our attention to the issues presented in that case. No. 85-8593 involves the issue raised by Talley and Kellar in their appeals,[17] and the prejudgment interest issue raised by the Osternecks in their cross-appeal.[18]

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17. Though E.T. Barwick and Barwick Industries filed notices of appeal, those appeals have been dismissed pursuant to Eleventh Circuit Rule 16(b). Hence, the judgment of the district court against Barwick Industries stands, and E.T. Barwick's appeal is abandoned.

18. The Osternecks also assert three claims challenging the verdict in favor of E.T. Barwick: (1) that the court improperly instructed the jury on the scienter requirement for aiding and abetting liability; (2) that the court improperly instructed the jury on the elements of a Rule 10b-5 claim; and (3) that no reasonable jury could have entered a verdict in Barwick's favor.

Any error in the jury instruction on aiding and abetting scienter was harmless. The jury found that Barwick was not primarily liable to the Osternecks under Rule 10b-5. The scienter requirement for 10b-5 is less than the proper scienter requirement for aiding and abetting liability. Accordingly, since the jury found no scienter for the primary liability, it could have found none for secondary liability either. *Cf. Cavalier Carpets, Inc. v. Caylor*, 746 F.2d 749, 758-59 (11th Cir.1984).

(Continued on following page)

On appeal, Talley argue: (1) that the district court improperly charged the jury with a four-year statute of limitations for the federal securities law claims; (2) that consequently, since prejudgment interest is not available under Georgia law, the award of prejudgment interest made by the district court under the federal securities law must be vacated; (3) that the district court improperly imposed upon him the burden of rebutting the Osternecks' bill of costs; and (4) that the district court erred in allowing his codefendants to cross-examine him when he testified at trial.

Appellant Kellar raises the following issues: (1) that the district court improperly charged a four-year statute of limitations on the federal securities claims; (2) that the district court erred in concluding that fraudulent concealment by third parties would toll the running of the federal securities statute of limitations against him; (3) that there was insufficient evidence to support a judgment that he was liable to the Osternecks on the federal securities claims; and (4) that there was insufficient evidence of scienter to support a judgment against him on the state common law fraud claims.

In reply the Osternecks contend: (1) that Talley and Kellar have waived their right to assign as error the district court's instruction to the jury applying the four-year statute of limitations to the federal securities claim; (2)

(Continued from previous page)

We have closely examined the Osternecks' remaining allegations of error with respect to the verdict in Barwick's favor and find that they are without merit and warrant no discussion.

that any error in charging the jury on the federal securities statute of limitations was harmless; and on cross-appeal the Ostornecks contend (3) that the district court abused its discretion in reducing by two-thirds the amount of prejudgment interest awarded to them.

A. *Statute of Limitations for the Federal Securities Claim*

Talley and Kellar assert that the district court committed several errors in determining the statute of limitations applicable to the Osterneeks' federal securities claims. If Talley and Kellar had been successful in bringing themselves within the protection of the statute of limitations, thus barring the federal securities claims, the award of prejudgment interest would have to be vacated, since prejudgment interest is not available on the state law claims in this particular case. *See infra*, note 24.

The federal securities laws do not provide a specific statute of limitations for private rights of action asserted under §§ 10(b), 20 and Rule 10b-5. Thus, federal courts are required to borrow the most appropriate statute of limitations from the forum state. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 N. 29, 96 S.Ct. 1375, 1389 n. 29, 47 L.Ed.2d 668 (1976); *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1502 (11th Cir. 1986).

In this case, the district court originally concluded that the two-year statute of limitations provision of Georgia's Securities Act was applicable. *See Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47, 50-51 (N.D. Ga.1978) (applying Ga.CodeAnn. § 97-114 (1973).[19] Subsequently, however, the district court accepted the Osternecks' argument that Georgia's four-year statute of limitations for common law fraud was the proper statute of limitations to borrow. In reaching this conclusion, the district court relied upon the district court opinion of Judge Shoob in the *Friedlander* case. *See Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 595 F.Supp. 1442, 1443-52 (N.D.Ga.1984) (applying O.C.G.A. § 9-3-31 (1982),[20] *rev'd*, 788 F.2d 1500 (11th Cir.1986). Thus, when this case was sent to the jury, they were instructed that the suit was timely brought if it was initiated within four years of when the Osternecks knew or reasonably should have known through the exercise of due diligence that they had a cause of action against the defendants.

This instruction also had the effect of tolling the statute of limitations. Even under a four-year statute of limitations, the Osternecks might have been required to begin litigation by September 1973—4 years after the 1969 merger. The court's instruction permitted the jury to conclude that the suit was timely, however, if they found that the Osternecks did not know and through due dili-

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19. The Georgia Securities Act of 1957 is applicable to this case. The alleged fraud occurred in 1969 prior to Georgia's revision of its securities law in 1973. However, the two-year statute of limitations for securities violations in the 1973 law is identical to that in section 13 of the 1957 Act. *See McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 892 n. 9 (5th Cir.1979). The 1973 statute has since been recodified. O.C.G.A. § 10-5-14 (1982).

20. This four-year statute of limitations for fraud, codified in 1982, is identical to that in effect in 1969. Ga.Code Ann. § 3-1002.

gence could not have known of the existence of their cause of action before September 4, 1971—the date four years before they filed suit.

Appellants Talley and Kellar now seek a new trial, arguing first that a two-year statute of limitations should properly have been charged to the jury. Because Talley and Kellar failed to object to the jury charges as required by Fed.R.Civ.P. 51, our review is restricted to one of plain error. Since we conclude that the district court's charge was not plainly erroneous, we reject the appellants' assertion that a new trial is necessary.

The law in this circuit is clear. Pursuant to Fed.R. Civ.P. 51, one who wishes to challenge on appeal a district court's instruction to the jury on the ground that it was an erroneous statement of the law must have objected to the instruction at trial. *See Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir.1984). One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties objection as his own. *Id.* In the obsence of an objection, a defendant is deemed to have waived his right to assign as error the district court's jury charge. We will depart from this rule only in narrow circumstances when an error is "so fundamental as to result in a miscarriage of justice," *see Barnett v. Housing Authority*, 707 F.2d 1571, 1580 (11th Cir.1983) (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir.1979)), or when the district court's instruction amounts to plain error, *see Barnett*, 707 F.2d at 1581 n. 18; *Johnson v. Bryant*, 671 F.2d 1276, 1281 (11th Cir.1982). *But see Williams v. Butler*, 746 F.2d 431, 443-44 (8th Cir.1984).

In the instant case, both Talley and Kellar failed to object to the district court's statute of limitations charge. Indeed, they were not even represented at trial having, by their own stipulation, been excused from attending the lengthy proceedings. Thus, though their codefendants E & W and E.T. Barwick did object to the jury instruction, Talley and Kellar did not adopt these objections. Consequently, they have failed to preserve the issue for review on appeal unless the instruction was plainly erroneous.

Nor will it do for Talley and Kellar to argue that the district court's decision permitting them to be absent from trial somehow excuses them from their obligations pursuant to Rule 51. This would create the perverse result of according greater lenity to those who do not appear at trial than to those who do appear but merely neglect to adopt the objections of their codefendants.

Moreover, both Talley and Kellar were fully aware that the district court was reconsidering its earlier determination to charge a two-year statute of limitations. They were both served with voluminous memoranda on the subject submitted by the Ostemecks and E & W, yet neither offered any reply of their own.[21] Thus, Talley and Kellar had ample opportunity to place their objections to the jury charge on the record as required by Rule 51. By failing to do so, they limited their own rights on appeal

21. Moreover, had Talley and Kellar been present at trial they might have sought a special verdict from the jury assessing liability under a two-year statute of limitations. The record indicates that the district court would have been receptive to such a suggestion.

and may only receive a new trial if the jury instruction amounted to plain error.[22]

In the circumstances of this case, we cannot conclude that the trial court was plainly erroneous in charging the jury as it did. As the Supreme Court has recognized, a "court's interpretation of the contours of [an area of legal uncertainty] hardly could give rise to plain judicial error [when] those contours are . . . in a state of evolving definition and uncertainty." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981); *see also Barnett*, 707 F.2d at 1581 n. 18; *Black v. Stephens*, 662 F.2d 181, 184 n. 1 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982).

The district court's jury instructions in this case were rendered at a time when the law concerning which statute of limitations to borrow from the forum state was uncer-

22. Talley and Kellar can find no comfort in our decision in *Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275 (5th Cir.1980). There we concluded that the failure to object to a jury charge "may be disregarded if the party's position has previously been made clear to the court and it is plain that a futher objection would be unavailing." *Id.* at 1279 (citation omitted). Appellants have satisfied neither prong of this requirement. Though their general position on the statute of limitations issue had been made clear to the court, neither Talley nor Kellar had addressed the immediate issue presented—the applicability of the then recently decided *Friedlander* district court opinion. Moreover, it could not have been plain that an objection would prove unavailing. The district court had previously chosen to apply a two-year statute of limitations and might easily have concluded that the *Friedlander* decision was distinguishable or that its earlier decision should not, for reasons of equity, be disturbed. Thus, the limited exception to Rule 51 contemplated in *Lang* is not applicable to this case.

tain. Applying a case-by-case analysis, the district court followed an earlier decision of the *Friedlander* district court, 595 F.Supp. at 1443-52, which chose a four-year statute of limitations in a similar securities case fraud case.

It was not until several months later that the Supreme Court, in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), revised the method by which courts should choose the appropriate statute of limitations to borrow and determined that lower courts must analyze the question on a statute-by-statute basis. Moreover, it was not until May 1986, over one year later, that this court first had occasion to apply the *Wilson* standard to a case involving the appropriate statute of limitations to be borrowed for federal securities claims. In *Friedlander*, 788 F.2d at 1507-09, we concluded that for all federal securities cases the appropriate statute of limitations to borrow is that of the Georgia Securities Act. Thus, though *Friedlander* now makes clear that the district court should properly have charged a two-year statute of limitations (since that is now and was in 1969 the statute of limitations in the Georgia Securities Act), we cannot say that the court's erroneous four-year charge was plain judicial error.[23] Given the uncertain and evolving contours of the law regarding the appropriate statute of limitations to borrow, we think the district court was

23. It follows, *a fortiori*, that the error was not so fundamental as to result in a miscarriage of justice.

reasonable in its erroneous conclusion that a four-year statute of limitations should apply.[24] For these reasons,[25]

24. Nor should the resolution we reach in this case be considered an inequitable one. Had a new trial been required because of an improper jury charge, it is likely, *see infra* note 31, that the only issue which such a new trial would resolve is the question of prejudgment interest. Though the damage judgment against Talley and Kellar was independently supported by the jury's finding that they were liable for common law fraud, prejudgment interest on the fraud judgment would not be available to the Ostornecks because they failed to comply with Georgia's statutory notice and demand requirement for prejudgment interest on unliquidated damages. *See* O.C.G.A. § 51-12-14. It was only this oversight by the Osternecks' attorneys which makes the federal statute of limitations question relevant; had the proper notice been filed an award of prejudgment interest under Georgia law would have provided an independent ground for affirmance and permitted us to pretermit the statute of limitations question. Thus, in some sense, the "inequity" of holding Talley and Kellar to the stringent requirement of Rule 51 is balanced by the "inequity" inherent in the stringent requirement of O.C.G.A. § 51-12-14 whose operation is all that renders the statute of limitations question relevant in the first place.

25. An additional ground for decision suggests itself. In *Saint Francis College v. Al-Khazraji*, — U.S. —, 107 S.Ct. 2022, 2025-26, 95 L.Ed.2d 582 (1987), the Supreme Court concluded that changes in a statute of limitations made pursuant to the commands of *Wilson* should not be applied retroactively if the change would overrule clear circuit precedent upon which the complaining party was entitled to rely and if the retroactive application would be inconsistent with the purpose of the underlying substantive statute. *Cf. Goodman v. Lukens Steel Co.*, — U.S. —, — - —, 107 S.Ct. 2617, 2620-22, 96 L.Ed. 2d 572 (1987) (applying *Wilson* retroactively where circuit precedent was unclear. Plainly our decision in *Friedlander* revised prior clear circuit precedent. *See McNeal*, 598 F.2d at 892. However, the parties have not briefed the issues of justifiable reliance and consistency with the purposes of the underlying Securities Act. Thus, we decline to rest our decision upon the *St. Francis* analysis and content ourselves with merely noting that it tends to support our conclusion that no plain error has occurred.

Talley and Kellar's assertion that the erroneous jury charge entitles them to a new trial is without merit.[26]

Kellar also argues that the district court erred in instructing the jury that the statute of limitations was tolled until such time as the Osternecks knew or through due diligence should have known of the existence of their cause of action. This instruction, Kellar contends, improperly allowed the fraudulent concealment of third parties, such as Talley and Barwick Indsutries, to be attributed to him. Instead, Kellar argues, the four-year statute of limitations should not be tolled against him because he did not do any fraudulent acts which would have concealed the Osternecks' cause of action. Were we to accept Kellar's argument the statute of limitations would have expired four years after the merger and the Osternecks' suit against Keilar would be barred.

Kellar, however, is mistaken.[27] Though the limitations period for a securities claim is borrowed from the forum state "the date when a claim accrues so as to trigger the state law limitation period is matter of federal law." *Sargent v. Genesco, Inc.*, 492 F.2d 750, 758 (5th Cir.1974). Under federal law the statute of limitations for a fraud action may be equitably tolled. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (tolling limitations period in action under Federal

26. Our resolution of the issue in this matter makes it, of course, unnecessary to consider the Osternecks' argument that any error in charging a four-year limitation period was harmless.

27. Consistent with our conclusion above, we review this instruction under the plainly erroneous standard. We conclude, however, that the district court instruction was a correct statement of the law and would have been sustained under any standard of review.

Farm Loan Act). This equitable tolling doctrine is plainly available to federal securities law plaintiffs. *Schaefer v. First National Bank*, 509 F.2d 1287, 1295-96 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976). Equity mandates that the statute of limitations be tolled until the fraud is discovered, *Sargent*, 492 F.2d at 758, provided that the plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part," *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 128 (7th Cir.1972) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1875)). Since the jury instructions plainly charged the jury with this exact standard, Kellar's contention that the district court erred is without merit.[28]

B. *Other Federal Issues*

Several other issues pertaining to the federal securities judgment have been raised by the parties. First, appellant Kellar contends that there was insufficient evi-

28. Kellar attempts to distinguish this line of cases, arguing that none involve situations where the existence of the cause of action was concealed by third parties and not by the defendant who seeks to take advantage of the statute of limitations. However, a well-established line of cases articulates an equitable tolling doctrine that does not depend upon affirmative concealment after the initial fraud. Where, as in this case, concealment is inherent in the nature of the wrong done, *cf. Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C. Cir 1984) (characterizing such acts as self-concealing fraud), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985), all that is necessary to toll the statute is a plaintiff's due diligence in seeking to discover the fraud, *id.* at 34 n. 103 (collecting cases applying this rule). *See also, Trecker v. Scag*, 679 F.2d 703, 708 (7th Cir.1982). Since only a demonstration of due diligence is necessary and since the Osternecks have made such a demonstration to the jury's satisfaction, the requirements for tolling the statute of limitations against Kellar have been satisfied.

dence to support the judgment against him. After carefully reviewing the record, we conclude that there was sufficient credible evidence of Kellar's direct liability to allow a jury to enter judgment against him,[29] and that this issue warrants no further discussion.

Appellant Talley raises two additional issues on appeal: (1) whether the district court improperly shifted to him the burden of rebutting the Osternecks' bill of costs; and (2) whether the district court erred in permitting his codefendants to cross-examine him at trial. We have closely examined these questions and find that the assignment of error are without merit and warrant no discussion.

The final federal issue posed is the Osternecks' contention that the district court abused its discretion in awarding prejudgment interest only in the amount of $945,512.85.[30] In making this award, the district court exercised two forms of discretion. First, the court chose to award prejudgment interest at the rate of 7% annually, not compounded. This required a total

29. Kellar also contends that there was insufficient evidence to support a judgment of liability against him on the theories that he aided and abetted Barwick Industries' securities fraud or that he was a controlling person in Barwick Industries within the meaning of the securities law. Because we conclude there was sufficient evidence to support a finding of direct liability, we need not consider these issues.

30. Talley and Kellar do not challenge the amount of the award. Their sole contention in this regard is that the award of prejudgment interest must be vacated because the judgment against them on the federal securities claims was based upon an improper jury instruction with respect to the statute of limitations. We have, however, rejected their contention that the federal judgment was improper. Hence, Talley and Kellar's challenge to the award of prejudgment interest must also be rejected.

interest award of over 2.8 million dollars. Though this interest award exceeded the principal judgment of $2,632,-234, it was nonetheless, the smallest interest award the trial court could have rendered. Other methods of calculation, for example compounding the principal in three-month certificates of deposit for the entire period of this litigation, would have produced interest awards of over 7 million dollars.

In its second exercise of discretion, the district court then determined that its initial interest award of some 2.8 million dollars should be reduced by two-thirds. This reduction reflected the district court's conclusion that: (1) an interest award in excess of the principal sum would be punitive; and (2) that a substantial portion of the delay in bringing this suit to a conclusion could be attributed either to actions the plaintiffs had taken or to delays inherent in the federal judicial system. Thus, the district court concluded that the defendants, having been responsible for no more than one-third of the delay in bringing this suit to trial, were responsible for only one-third of the prejudgment interest which might be awarded. Consequently, the district court awarded prejudgment interest on the federal securities claim in the amount of $945,512.85. The Osternecks challenge only this second exercise of discretion.

It is clear that whether "prejudgment interest should be awarded on a damage recovery in a [federal securities] action is a question of fairness resting within the District Court's sound discretion." *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973). Moreover, in awarding prejudgment interest, the district court must insure that the award is

not punitive in nature. *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191-92 (2d Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1121, 25 L.Ed.2d 396 (1970). Finally, because the award of prejudgment interest is compensatory rather than punitive, the award must be "tempered by an assessment of the equities." *Id.* at 1191. It is apparent to us that the factors relied upon by the district court are precisely the sorts of equitable considerations which should be evaluated in making a prejudgment interest award. Therefore, we cannot conclude that the district court abused its discretion in awarding the Osternecks only $945,512.85 in prejudgment interest.

For the reasons stated in the foregoing analysis, the federal securities judgment in the amount of $2,632,234 entered in favor of the plaintiffs and against Barwick Industries, Kellar and Talley with prejudgment interest in the amount of $945,512.85 is, in all respects, affirmed.[31]

III. CONCLUSION

In sum, the appeals in Case Nos. 85-8165 and 85-8523 are DISMISSED for want of appellate jurisdiction. The judgment in Case No. 85-8593 is AFFIRMED.

AFFIRMED in part, and appeals DISMISSED in part.

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31. The federal securities judgment which we affirm includes prejudgment interest. Thus, the total award received by the Osternecks on their federal claim exceeds the amount they were awarded based upon their state common law fraud judgment. Consequently, because a second recovery on the state law claims would not be possible, we need not address any issues presented by the challenge to the state law judgment and we expressly decline to decide them. However, *see supra* note 24.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-8165

MYLES OSTERNECK, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

versus

E.T. BARWICK INDUSTRIES,
Defendant,

E.T. BARWICK,
Defendant,

M.E. KELLAR,
Defendant-Appellant,
Cross-Appellee,

BUFORD TALLEY,
Defendant-Appellant,
Cross-Appellee,

ERNST & WHINNEY,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 31, 11 Cir., 1987, — F.2d —)
(Filed October 19, 1987)

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. L. Anderson
United States Circuit Judge

ORD-42